

MCLE ON THE WEB

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TEST # 54
1 HOUR CREDIT
SUBSTANCE ABUSE

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Lawyers and Substance Abuse

Familiarity with the symptoms of alcoholism can enhance your risk management procedures

By ELLEN R. PECK
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Will Beauman, an insurance company executive who ran and designed one of the best risk management educational programs for lawyers in the country and one of California Joan's favorite lawyers, called Cali, interrupting her work on a pleading.

"Cali, we'd like you to present a substance abuse MCLE program for our insureds," Will said.

"Will, I have difficulty presenting substance abuse programs because most of the lawyers in the room are hostile, disgruntled or uninterested. Many resent being required to take an hour of substance abuse every three years because a minority of lawyers has substance abuse problems. Not seeing the relevance of substance abuse issues to their practices, others simply close down and pay no attention to any information presented," Cali protested.

"Given the pervasiveness of substance abuse in our society, the reaction is surprising," Will said. "Although an estimated two-thirds of adult Americans drink alcohol occasionally, about 7 percent are problem drinkers, with a portion of those being alcoholics. (46 Am. Jur. Proof of Facts 2d 563 [Gregory G. Sarno, J.D., *Mental or Emotional Disturbance As Defense or Mitigating Factor In Attorney Disciplinary Proceeding*], §2 at fn. 14.)

"The National Institute of Alcohol and Alcoholism estimates that nearly 14 million Americans — one in every 13 adults — abuse alcohol or are alcoholic. Several million more adults engage in risky drinking, such as binge drinking or heavy drinking on a regular basis, that can lead to alcohol problems." (See: niaaa.nih.gov/publications/booklet.htm [*Alcoholism — Getting the Facts.*])

"Moreover, 53 percent of American men and women have reported that one or more of their close relatives have a drinking problem," added Cali. (NIAAA: *Alcoholism — Getting the Facts.*)

Will told her the latest data about illicit drug use. "The 2003 National Survey on Drug Use and Health (NSDUH), the annual survey of the civilian, noninstitutionalized population of the United States, age 12 or older, reported these findings about Americans' use of illicit drugs (oas.samhsa.gov/NHSDA/2k3NSDUH/2k3results.htm#ch2):

- "In 2003, an estimated 19.5 million Americans (8.2 percent) age 12 or older had used illicit drugs during the month prior to the survey interview.
- "Marijuana was the most commonly used illicit drug (14.6 million past month users, 75.2 percent of illicit drug users). About 54.6 percent of illicit drug users used only marijuana, 20.6 percent used marijuana and another illicit drug, and the remaining 24.8 percent used an illicit drug but not marijuana in the past month.
- "About 45.4 percent of current illicit drug users in 2003 (8.8 million Americans) used illicit drugs other than marijuana and hashish, either with or without using marijuana. An estimated 2.3 million persons (1 percent) used cocaine, 604,000 of whom used crack during the same time period (.3 percent); hallucinogens were used by 1 million persons (.4 percent); and an estimated 119,000 Americans used heroin (.1 percent).
- "The highest illicit drug use was among young persons, peaking among 18- to 20-year-olds (23.3 percent) and declining steadily after that point with increas-

ing age.”

“Scary statistics,” Cali said. “Moreover, 42 percent of the State Bar Court’s active caseload involves attorneys with chemical dependency or mental health issues. (California Bar Journal, July 2005, *A Heavy Caseload of Addiction*.)

“The ability to identify substance abuse in partners, associates and support personnel can prevent potential risk to client matters and prevent civil and disciplinary liability for failure to supervise or to protect the client,” Will added.

Cali nodded in agreement. “One of my clients hired a young and promising associate who started to develop alcohol abuse problems. The associate was similar to the lawyer in *In re Billings* (1990) 50 Cal.3d 358, 787 P.2d 617, 267 Cal.Rptr. 319 (*Billings*).

“Both sides of Mr. Billings’ family had alcoholism. He started using alcohol in his childhood, when his parents encouraged him to drink a can of beer with dinner. He first got drunk at age 10 or 11; alcohol dependency increased with age. When he began to practice law, at age 28 or 29, his “pressure-oriented” drinking became a habit. Mr. Billings experienced a downward spiral because of his increasing uncontrolled consumption of liquor: he neglected his law practice, had increasing financial difficulties and his girlfriend left him. (*Billings*, pp. 363-364.)

“Mr. Billings abandoned or partially abandoned legal work for 18 clients, failed to communicate with them and failed to refund unearned fees for many clients. After gravely injuring a passenger in an automobile accident, he entered a plea of nolo contendere to a misdemeanor charge of drunk driving, and after being suspended for non-payment of bar dues, he continued to practice law while suspended.” (*Billings*, pp. 360-362.)

During disciplinary proceedings, Mr. Billings claimed that his severe alcohol dependency caused his misconduct and that his rehabilitation should mitigate any sanction. His rehabilitation included abstinence from the use of alcohol for a two-year period prior to the Supreme Court hearing; and participation in a special alcohol treatment program and extensive participation in various Alcoholics Anonymous groups and meetings. (*Billings*, pp. 364-365.)

The Supreme Court held that rehabilitation from alcoholism or substance abuse is given significant weight in mitigation if a lawyer proves: (1) the abuse was addictive in nature, (2) the abuse causally contributed to the misconduct, and (3) the attorney has undergone a meaningful and sustained period of rehabilitation. (*Billings*, p. 367.) The period of rehabilitation necessary to demonstrate “meaningful and sustained” rehabilitation varies from case to case. (*Billings*, p. 367.)

Even though recovery from addiction to illicit drugs remains a mitigating factor, addiction through voluntary use of illicit drugs (e.g., cocaine) is an aggravating factor because use of illicit drugs increases the danger a lawyer presents to the public, the courts and the reputation of the legal profession. (*In re Demergian* (1989) 48 Cal.3d 284, 294-295, 256 Cal.Rptr. 392, 768 P.2d 1069.)

Mr. Billings was disbarred because he did not prove that his two years of rehabilitation was “meaningful” in light of the nature and extent of misconduct over a protracted period of time. (*Billings*, pp. 367, 369.)

“Did your client or his associates have disciplinary problems because of the associate’s alcohol abuse?” Will asked.

“No,” answered Cali, “because, as a result of attending these programs, my client was familiar with the symptoms of alcohol abuse. He was able to guide the associate into getting assistance through The Other Bar before any misconduct occurred.”

“The Other Bar is the network of recovering lawyers and judges throughout the state, dedicated to assisting others within the profession who are suffering from alcohol and substance abuse problems?” Will asked.

“Yes, it is a private, non-profit corporation funded by the State Bar and private donations, founded on the principle of anonymity and providing strict confidential services. The program is voluntary and open to all California lawyers, judges and law students, with consultants and volunteers standing ready to assist their colleagues in all areas of recovery,” Cali explained. (See otherbar.org.)

“I understand that the State Bar Lawyer Assistance Program (LAP) is also a terrific program to help lawyers get treatment before their alcohol or substance abuse creates problems in their practices and that financial assistance to obtain treatment is sometimes available,” Will added. (Call 1-877-LAP-4-HELP (1-877-527-4435) or calbar.ca.gov/lap.)

“Many lawyers do not realize that their right to practice law can be at risk by the effects of alcohol abuse in their private lives, unconnected with law practice,” Cali continued.

“Anna Lou Kelley was twice convicted of alcohol-related vehicular violations within a two-year period and within four years of admission, completely unconnected with the practice of law. The California Supreme Court publicly reprimanded her and placed her on probation for three years, after finding that her convictions were ‘other misconduct warranting discipline.’

“The court found that Ms. Kelley’s behavior evidenced ‘both a lack of respect for the legal system and an alcohol abuse problem’ which, ‘if not checked, may spill over into [Ms. Kelley’s] professional practice and adversely affect her representation of clients and her practice of law.’” (*In re Kelley* (1990) 52 Cal.3d 487, 491-492, 496-497, 499, 801 P.2d 1126, 276 Cal.Rptr. 375.)

“The lesson of these cases is that a lawyer should voluntarily seek assistance through The Other Bar, the State Bar’s LAP or other treatment program, even if the lawyer (like Ms. Kelley) does not believe that he or she has a problem,” Will observed. “Do you think we should discuss what causes alcoholism?”

“Yes,” Cali answered. “The debate about the causes of substance dependence range from biological and genetic factors, learning factors, cognitive factors, to social factors. (46 Am. Jur. Proof of Facts 2d 563, §2, fn. 18-22.) The California Supreme Court has adopted the ‘treatable disease’ model of alcoholism, which is the current consensus of the medical community. (*Billings*, pp. 367-368.) The disease model holds that alcoholics are essentially different from nonalcoholics, since alcoholics experience an irresistible physical craving for alcohol, a loss of control and a progressive physical dependence upon alcohol.

“Since even the consumption of a small amount of alcohol is enough to compel an alcoholic to continue drinking, complete abstinence is the only way in which alcoholics can be treated.” (46 Am. Jur. Proof of Facts 2d 563, §2; Alcoholics Anonymous World Services, Inc., *Alcoholics Anonymous* (3d ed. 1976) foreword p. xxii.)

“The NIAAA identifies four symptoms of alcoholism — (1) Craving: A strong need, or compulsion, to drink; (2) Loss of control: The inability to limit one’s drinking on any given occasion; (3) Physical dependence: Withdrawal symptoms, such as nausea, sweating, shakiness and anxiety, occur when alcohol use is stopped after a period of heavy drinking; and (4) Tolerance: The need to drink greater amounts of alcohol in order to ‘get high,’” Will reported. (See niaaa.nih.gov/publications/booklet.htm.)

“By contrast,” Cali commented, “alcohol abuse does not include an extremely strong craving for alcohol, loss of control over drinking or physical dependence. It can be defined by a pattern of drinking that results in one or more of the following situations within a 12-month period: (1) failure to fulfill major work, school or home responsibilities; (2) drinking in situations that are physically dangerous, such as while driving a car or operating machinery; (3) having recurring alcohol-related legal problems, such as being arrested for driving under the influence of alcohol or for physically hurting someone while drunk; and (4) continued drinking despite having ongoing relationship problems that are caused or worsened by the drinking.” (See niaaa.nih.gov/publications/booklet.htm.)

“The NIAAA, which funds approximately 90 percent of all alcoholism research in the United States, is conducting investigations concerning the causes, consequences, treatment and prevention of alcoholism,” Will noted.

“Genetic research concerning the genes involved in increasing an individual’s risk for alcoholism is ongoing. Scientists have found areas on chromosomes where the genes are probably located using new techniques which may permit the identification and measurement of the specific contribution of each gene to the complex behaviors associated with heavy drinking. It is hoped this research will provide the basis for new medications to treat alcohol-related problems,” Cali responded.

Will added, “Naltrexone is a promising new anticraving medication, which targets the brain’s reward circuits. In combination with behavioral therapy, it has been effective in treating alcoholism.

“Another anticraving drug widely used in Europe, Acamprosate, is believed to work on different brain circuits to ease the physical discomfort that occurs when an alcoholic stops drinking. Acamprosate may be approved for use in the United States in the near future. The NIAAA has also initiated a large-scale clinical trial to determine which of the currently available medications and which behavioral therapies work best together and to determine if use of both drugs simultaneously is beneficial.

“Besides just satisfying a ‘special subject’ credit, keeping current about identifying substance abuse, the causes and its treatment are tools which equip lawyers to improve their practices,” Will added. “Identifying and assisting clients who abuse substances or who have legal problems because of substance abuse in the family, as well as managing the risk of harm to clients from partners, associates or support personnel who may suffer from substance abuse, are necessary tools for the practice of law today, whether or not a lawyer may have substance abuse problems.”

Agreeing to present the program, Cali concluded, “Remember, vigilance is important since a lawyer never knows when a person with substance abuse issues

will walk into the practice.”

■ *Ellen R. Peck, a former State Bar Court judge, is a sole practitioner from Escondido and a co-author of The Rutter Group California Practice Guide: Professional Responsibility.*

Test — Legal Ethics

1 Hour MCLE Credit

1. Almost one-third of adult Americans do not drink alcohol, even occasionally.
2. One in 13 adult Americans abuse alcohol or are alcoholics.
3. Almost 75 percent of Americans report that no one in their family has or ever has had any drinking problems.
4. In 2003, an estimated 8.2 percent of the American population, age 12 or older, had used illicit drugs during the month prior to a survey interview.
5. In 2003, about 75 percent of illicit drug use among Americans age 12 and older involved marijuana.
6. Drug use is most prevalent in the “30-something” adult population.
7. More than half of illicit drug users use only marijuana.
8. About 42 percent of the State Bar Court’s active caseload involve attorneys with chemical dependency or mental health issues.
9. In an attorney disciplinary case, mitigation for misconduct due to alcohol abuse may be established if a lawyer proves: (1) the abuse was addictive in nature, (2) the abuse causally contributed to the misconduct and (3) the attorney has undergone a meaningful and sustained period of rehabilitation.
10. Cocaine addiction that causes misconduct in a client matter is a mitigating factor in an attorney disciplinary proceeding.
11. The period of rehabilitation necessary to demonstrate “meaningful and sustained” rehabilitation is two years.
12. Conviction of alcohol-related vehicular offenses, unrelated to the handling of a client matter, can never have disciplinary consequences.
13. The California Supreme Court has opined that alcoholism is a learned and socially conditioned phenomenon.
14. The need to drink greater amounts of alcohol in order to “get high” is one of the symptoms of alcoholism.
15. A pattern of drinking coupled with drinking in situations that are physically dangerous, such as while driving a car or operating machinery, is a symptom of alcohol abuse.
16. Alcohol abuse involves extremely strong cravings for alcohol accompanied by physical dependence upon alcohol.
17. Scientists have found areas on chromosomes where genes involved in increasing an individual’s risk for alcoholism are probably located.
18. The drug Naltrexone, an anti-craving medication that targets the brain’s reward circuits, is a complete cure for alcoholism.
19. Even the consumption of a small amount of alcohol is enough to compel an alcoholic to continue drinking.
20. The State Bar Lawyer Assist-ance Program and The Other Bar are voluntary programs designed to assist lawyers in finding treatment for alcohol and substance abuse as well as support during treatment.

Certification

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour in substance abuse.
- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

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TEST #54 — Lawyers and Substance Abuse

1 HOUR CREDIT SUBSTANCE ABUSE

- Print the answer form only and answer the test questions.
- Mail only form and check for \$20 to:

MCLE ON THE WEB — CBJ
The State Bar of California
180 Howard Street
San Francisco, CA 94105

- Make checks payable to State Bar of California.
- A CLE certificate will be mailed to you within eight weeks.

Name

Law Firm/Organization

Address

State/Zip

State Bar Number (Required)

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| 1. True___ False___ | 11. True___ False___ |
| 2. True___ False___ | 12. True___ False___ |
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